BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS BELOW.

The District Court rendered no opinion, but the charge of the Court to the jury is set forth at pages 41-73 of the Record.

The opinion of the Circuit Court of Appeals is set forth at page 122 of the Record and is reported as *Miller* v. *U. S.*, 125 F(2d) 517.

II. STATEMENT OF THE CASE AND GROUNDS OF JURISDICTION.

The case being fully stated at pages 1 to 5 of the annexed petition, and the grounds for invoking jurisdiction of this court set out at page 7 they are not here repeated.

III. SPECIFICATION OF ERRORS.

The only assigned error intended to be urged is the question of whether any offense is charged. This question was duly raised in the District Court by challenge to the sufficiency of the indictment by Motion to Quash (R. 7) denied by the court, and exceptions allowed, (R. 13) and Motion for Directed Verdict and Dismissal (R. 14) also denied by the court and exceptions allowed (R. 11). It was preserved in the Circuit Court of Appeals as one of the grounds of appeal (R. 84) and assignments of error (R. 100) as well as by petition for rehearing (R. 127).

The same erroneous conception of the law which caused the District Court to uphold the indictment is reflected in

the court's charge to the jury, particularly the affirmative charge at page 53 of the record and the refusal to charge (R. 60, 71-73) substantially in accordance with defendant's requests No. 3 (R. 33, 71) and No. 7 (R. 35, 72). Since the insufficiency of the indictment and the error in the charge stem from what we believe to be the same erroneous construction of the crime of concealment of assets from a receiver in bankruptcy (11 U. S. C., Sec. 52b) the entire subject is treated as one in the ensuing argument.

IV. ARGUMENT.

The Bankruptcy Act in force at the time in question, 44 Stat. 665 (it was shortly afterwards broadened by the Chandler Act effective September 22, 1938) made the following offenses punishable:

> "A person shall be punished * * * upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, trustee, United States marshal or other officer * * * any property belonging to the estate of a bankrupt * * * or, (6) having been an agent or officer of any person or corporation, and in contemplation of the bankruptcy of such person or corporation, or with intent to defeat the operation of this Act, concealed or transferred any of the property of such debtor * * *"
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> —44 Stat. 665; 11 U. S. C. 52B (prior to the Chandler Act, 52 Stat. 855).

Since the United States elected (R. 10) to proceed under subdivision (1) quoted above, subdivision (6) is important only by way of contrast.

The question presented here is as to the meaning of "conceal" and the elements of the crime of concealment under the quoted sections.

At first blush there does not appear to be any problem for apparently all that is needed to complete the crime are 1) a concealing or hiding and 2) from a receiver or trustee in bankruptcy.

Indeed, if the physical act of concealing or hiding always took place *after* bankruptcy there would be but little trouble for the mere physical act of hiding assets after knowledge of the trustee's rights carries its own guilty implications.

But unfortunately the usual pattern is that the physical act of secreting or hiding took place *before* bankruptcy and was followed by mere passive silence and failure to disclose, after bankruptcy.

In such cases of concealment *prior* to bankruptcy, when is the crime denounced by the statute complete?

The lower Federal Courts have not answered this question clearly, nor with unanimity of expression.

On the one hand, the above superficial view that only two elements are needed has been frequently expressed: 1) a concealment or hiding, continuing until 2) the appointment of a receiver or trustee. Under this view, where there was a concealment, continuing until the appointment of a receiver or trustee, *instantly*, both elements exist and the crime is complete. This is the view necessary to uphold the conviction at bar, and has seeming support in what we believe to be loose and not well stated phrases in some lower Federal Court decisions.

On the other hand, we believe the better view to be that in cases of concealment *prior* to bankruptcy, the two elements named above are not sufficient to complete the crime for the bankruptcy law expressly allows the bankrupt and its officers a normal statutory period, and a statutory method of procedure, in which to collect its affairs and to make full disclosure of its assets. The bankrupt and its officers have the right to take full ad-

vantage of this statutory period of time and method of disclosure, and until the statutory period has elapsed, or the statutory procedure not followed, there is no crime of concealment. Recognition is of course given to abnormal cases, in that the Court by special order may require an earlier, or different method, of disclosure but unless so ordered by the Court the normal statutory period and method apply.

The adoption of this view would require reversal of the case at bar, for the indictment shows upon its face that the normal statutory period had not expired and there is no charge that the Court had ordered any shortening of the period, or any different method of disclosure.

There is seeming authority and reason for each of the above views in the decisions of the lower Federal Courts and we respectfully urge that this case permits this Court to clarify the decisions, do justice to petitioners, and pronounce the elements of the crime of concealment under the bankruptcy act. It is a frequent problem to all bankruptcy courts, and officers thereof, as well as to members of the bar generally in advising bankrupts as to their duties and procedure.

Illustrations of the first view, above, that the crime is complete *INSTANTLY* where there was a concealment prior to bankruptcy, and continuing until a receiver or trustee are appointed may be given:

> "I think the cases speaking of the concealment as continuing, mean just as Judge Toulmin says, that if the concealment began before a trustee or other officer was entitled to the possession of the property concealed, and continued until that, time, the bankrupt would then become criminally liable."
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> *United States* v. *Trotter*, 8 F. Supp. 275 at 276 (D. C.)

"On these facts there is no doubt that Messer was guilty of concealing while a bankrupt, and from his trustee, property belonging to his estate in bankruptcy * * * and it makes no difference that the original concealment occurred before the actual filing of the involuntary petition herein, for the concealment continued after the appointment and qualification of the trustee and was, therefore, a concealment from him."

Reinstein v. *United States,* 282 Fed. 214 at 216 (2d C. C. A.)

"By concealment of property, the Act contemplates a continuous concealment in cases where property is physically converted and concealed before bankruptcy and remains secreted and concealed after bankruptcy."

Glass v. *United States,* 231 F. 65, 67 (3rd C. C. A.)

"Concealment of assets of a bankrupt before the appointment of a trustee, and continuing after such appointment, held a concealment from the trustee in violation of the Bankruptcy Act."

In re Brincot, 233 F. 811, 816 (D. C.)

"If a bankrupt conceals his property prior to his bankruptcy, and continues to conceal it after the trustee is appointed, he is guilty of a violation of the statute."

Arine v. *United States,* 10 F. (2d) 778 at 779 (9th C.C.A.)

On the basis of the foregoing and similar expressions the Court below may have concluded, for instance, that where the second count here charged a "concealment" on April 18, 1938 (R. 6) and the receiver's appointment on that very same day (R. 5) the crime was complete regardless of the fact that the bankrupt legally had at least until May 12, 1938 to make disclosure. The omission of

the usual indictment charge of scienter (R. 6) "knowingly" and the mere allegations of "unlawfully, wilfully and fraudulently" (R. 6) is justified under this view for the crime was complete when there was a concealment prior to bankruptcy, followed by bankruptcy and the appointment of a trustee or receiver, regardless of whether the bankrupt *knew* of the appointment of the receiver or not.

This same theory and view explains why the District Judge should *refuse* to charge defendants request number Three or some equivalent, (R. 60) which was (R. 34):

> "If you find from the evidence in this case that the defendants did not know, or understand or recognize the authority of the Receiver, Harry McVeigh, then you must find that their failure to tell him anything was not due to any criminal intent; there would be no concealment as a matter of law * * *."

and it explains also the affirmative charge of the District Court that:

> "If you find that bankruptcy proceedings were pending against the Alaska Smoked Fish Company, it was the defendant's duty to disclose and turn over to the receiver all of said corporation. The demand upon them by the receiver as claimed in this case *was not a prerequisite to the commission of the offense.*" (R. 53; italics ours.)

for of course, under this view, the elements are the concealment and the appointment of a receiver, regardless of whether the bankrupt knew of the appointment or not.(*)

(*) The Bill of Exceptions appears to begin on page 98 and end on page 99, with nothing in between, whereas in fact pages 7 to 86, both inclusive, are included in the original Bill of Exceptions. In omitting duplications as required by Court rule, the prnter failed to indicate the omitted duplicate matter. The Assistant District Attorney, with commendable fairness, made no point of the matter in oral argument before the Court of Appeals.

But the difficulty with the foregoing view is that it overlooks the two different concepts in the term "conceal" —one active, one passive.

Concealment, connoting activity, indicates affirmative action such as the act of secreting, hiding or covering up from sight.

Webster's Dictionary discloses the use of the word in this active sense:

> "*Conceal.* To hide or withdraw from observation; to cover or keep from sight."

as well as the passive sense:

> "*Conceal* . . . To withhold knowledge of."

So, the editors of Corpus Juris Secundum refer to both meanings:

> "*Conceal* . . . According to the best lexicographers signifies to withhold or to keep secret mental facts from the knowledge of another person, as well as to hide, cover up, or secrete physical objects from sight or observation. It implies affirmative action, something more than a mere faliure to disclose."
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> 15 C. J. S. 793.

It at once becomes apparent that where the act of secreting was *before* bankruptcy, and the term is applied in the passive sense—that is, a mere failure to disclose—at once the problem is: When did the duty to speak and disclose arise?

Obviously, there can be no duty to speak and disclose until one has an opportunity to speak.

Many a man keeps property in a safe deposit box or vault, perhaps in his wife's name, or even in the name of another. Many have bank accounts, securities, real

or personal property covered up in a safe deposit box, vault, home or business, the whereabouts known only to themselves. They are "concealed" knowingly, and perhaps even fraudulently, as for example, to keep from a wife, the public or even creditors, for it is no violation of the Bankruptcy Act to conceal one's property prior to bankruptcy and not in contemplation of bankruptcy.

> "The power of Congress to declare the fraudulent concealment by a debtor of his property prior to the institution of bankruptcy proceedings, unless possibly in case he contemplated such proceedings, may be doubted, but that question we need not decide, for the act evinces no such intention."
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> *Rachmil* v. *United States*, 43 F. (2d) 878. (9th C.C.A.)

Unquestionably property so hidden away comes within the term "concealed" just as much as is property which might be in plain sight, uncovered and open to view, if only its whereabouts were known. If bankruptcy intervenes and a receiver or trustee is appointed, do all these persons become ipso facto, instantly, criminals?

Under what we submit is the better view, the answer must be "No—such persons should have time to disclose after the receiver or trustee is appointed." Any man against whom an involuntary proceeding is filed, may honestly defend the proceeding, and the court finally adjudge him insolvent. It is not possible to thereupon instantaneously list all one's assets, especially if it be a large business concern.

Absent anything to the contrary, a man should have a reasonable time to disclose his assets, and in fact Congress has given recognition to the justness of the principle

by giving the bankrupt ten days (*) in which to list or schedule assets in involuntary cases:

> "The bankrupt shall * * * (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication * * * a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail * * *"
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> 11 U. S. C., Sec. 25 (prior to Chandler Act).

We do not mean to contend that there may not be unusual cases where an earlier disclosure may be required. Indeed, Congress has anticipated just such circumstance and expressly provided:

> "The bankrupt shall * * * (9) when present at the first meeting of his creditors, *and at such other times as the Court shall order,* submit to an examination concerning * * * the amount, kind and whereabouts of his property * * * but no testimony given by him shall be offered in evidence against him in any criminal proceeding."
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> 11 U. S. Code, Sec. 25.

The first meeting of creditors, referred to above, normally cannot be less than ten days after adjudication:

> "The court shall cause the first meeting of the creditors of a bankrupt to be held not less than 10 nor more than 30 days after the adjudication."
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> 11 U. S. Code, Sec. 91.

In the case at bar, the bankrupt and its officers had at least ten days after the adjudication on May 2, 1938 (R. 5)—that is, until May 12, 1938, to disclose its assets, by filing schedules or at the first meeting of creditors and

(*) The Chandler Act (52 Stat. 847) has since shortened the period to 5 days.

there is no charge that this time had been shortened by court order or otherwise and hence there could be no offense on April 18, 1938 as charged in the second count, or at any time up to April 29, 1938 when the trustee took the property itself into possession.

This view of the law finds apparent support in some of the lower Federal decisions:

> "The offense is completed, if the property was concealed knowingly and fraudulently before bankruptcy and, on the appointment of a trustee, the bankrupt fails to surrender it or to disclose the disposition he has made of it. A concealment from a trustee after his appointment and a failure to deliver over to him *upon demand* any property or cash which the bankrupt may have in his possession is an offense as of any date that the concealment continues." (Italics ours).
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> *Gerson* v. *U. S.*, 25 F. (2d) 49 at 55, quoting
> *1 Collier on Bankruptcy*, p. 899 and citing
> *Alkon* v. *U. S.*, 163 F. 810
> *Morrow* v. *U. S.*, 11 F. (2d) 256

This view is irreconcilable with the view of the Courts below, which was expressed by the District Judge thus: (R. 53):

> "The demand upon them by the receiver as claimed in this case *was not a prerequisite to the commission of the offense.*" (Italics ours).

Whether the Receiver could require the bankrupt or its officers to make a disclosure of all assets prior to May 12, 1938 by making a demand, without any court order, is itself debatable, and not settled law.

The Court in *Gerson* v. *U. S.*, 25 F. (2d) 49 at 55, quoted supra indicates that the trustee or receiver may shorten the time for disclosure:

> "A concealment from a trustee after his appointment and a failure to deliver over to him *upon demand* any property or cash which the bankrupt may have in his possession is an offense as of any date that the concealment continues." (Italics ours).

On the other hand, Congress has required that the bankrupt and its officers make disclosures in the schedules or at meetings of creditors, and such other times as are *ordered by the Court*. (11 U. S. C., Sec. 25, supra). Furthermore Congress has seen fit to throw certain protection around the bankrupt, by expressly providing that his testimony and disclosures at any of the Court hearings cannot be used against him:

> " • • • but no testimony given by him [at such court hearings] shall be offered in evidence against him in any criminal proceedings."
>
> *11 U. S. Code*, Sec. 25.

Surely the bankrupt is as much in need of the foregoing protection for alleged statements made to a trustee or receiver, as he is for testimony given under the protection and justice of a court.

It would appear logical that a bankrupt might *lawfully refuse* to make any *disclosure* to a receiver or trustee and insist upon his right to make such disclosure only in his schedules, where he may consult counsel, or when present under Court protection where his testimony cannot be used against him, in the absence of some *court order* requiring earlier or different method of disclosure. Observe that we do *not* contend that either the bankrupt or its officers can refuse to *deliver* property on demand, to the receiver; that may be contempt of court or some other offense, but it is not the offense of *concealing* for which these petitioners were indicted.

Whether, as a matter of abstract law the receiver or trustee can shorten the period for disclosure, or change the statutory method of disclosure by filing schedules or by testimony at creditor's meetings, or whether a court order is required, is immaterial at bar for the indictment does not charge that the court ordered the normal period —May 12, 1938—shortened or the method—(by schedules or testimony)—changed, nor that the receiver made any such demand.

We respectfully submit that the true interpretation of Section 52(b) is that an officer of a corporation is not guilty of the crime denounced merely because he did not instantly disclose all of the corporation's assets, or the whereabouts of the same, as soon as the receiver was appointed. Such officer would have the *right*, as a matter of law, to wait until May 12, 1938 (where the adjudication was May 2, 1938) to disclose assets, in Schedules or at the first creditor's meeting, in the absence of any court order or demand from the Court, or receiver, for an earlier disclosure.

If this is true, then the indictment at bar charges no offense, for not content with charging the crime in the language of the statute alone, the indictment expressly sets forth upon its face the facts which negative the existence of any crime.

The indictment charges that specified, identified property—830 cases of groceries, 290 cans of sardines, 12 lbs. of tea, 36 cans of mushrooms (R. 2, 6) were "concealed."

It is expressly charged that the adjudication took place May 2, 1938, and as shown, the officers of the bankrupt had until May 12, 1938 to make disclosure. There is no charge that this period had been shortened by court order, receiver's demand or otherwise. To charge, therefore, that the petitioners "concealed"—failed to disclose—

assets on April 18, 1938 (as set out in the substantive offense, count 2, R. 6) or any time up to April 29th, when the Receivers took possession of the very property in question (as set out in the conspiracy count, R. 2) when it is the law that they did not have to disclose until May 12, 1938 charges merely that the petitioners did what they had a lawful right to do, and not an offense against the United States.

In all respect to the Court of Appeals below, which conceded in its opinion that there was an element of "inconsistency" in the indictment, (R. 124) we do not argue that the indictment is insufficient because of any omissions, or dangers of a second prosecution. We fear the point we make was misunderstood, and for that reason (we sincerely submit) not answered in the opinion below. Our contention is that the express averments of facts in the indictment negative any offense.

The law being that the petitioners had a right to wait until May 12, 1938 to disclose that the corporation owned identified, specific property—830 cases groceries, etc.—they cannot be guilty either of the offense of concealing that identical property on April 18, 1938 or any other time prior to May 12, 1938 nor are they guilty of any conspiracy to commit the offense of not disclosing the identical property, because the Receiver "discovered" it on April 29, 1938, when they had until May 12, 1938 to disclose it.

CONCLUSION.

From the foregoing exposition we believe it is obvious that the lower federal courts have been uncertain as to the elements of the crime of "concealment" under the Bankruptcy Act as applied to the ordinary case where there was the physical act of hiding or secreting prior to bankruptcy, continuing until bankruptcy.

On the one hand is the view that where there was a hiding or secreting prior to bankruptcy, continuing until bankruptcy and the appointment of a receiver or trustee, ipso facto, the crime is complete.

On the other hand is the view that where the physical act of secreting was prior to bankruptcy, continuing until bankruptcy, mere silence or failure to disclose is not unlawful until the duty arises to disclose. By the express terms of the Bankruptcy Act this duty to speak is at any time until the schedules are due, or until the examination of the bankrupt at the first creditor's meeting, unless the court has ordered some earlier disclosure. Consequently, there is no crime of concealment in such cases until the statutory period has elapsed in the absence of some court order shortening the period, or at least in the absence of any demand for an earlier disclosure by the court or its officers.

We submit that while the first view hereinabove set forth has been perhaps more frequently expressed than the latter, that the latter view is the more logical.

This court, we urge with respect, ought to clarify the law and determine finally the elements of the crime of concealment. This would be of practical every day benefit to courts of bankruptcy, members of the Bar and the public generally.

The adoption of the latter view expressed above, which we submit is the only sound view, requires reversal of the

case here presented because the indictment shows upon its face that no crime has been committed.

Respectfully submitted,

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